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No. 06-1171

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

JOSEPH D. KOUTNIK,

Petitioner,

v.

LEBBEUS BROWN, GERALD A. BERGE, and MATTHEW J. FRANK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 3, 2007

QUESTIONS PRESENTED

The petitioner, a Wisconsin prisoner, had a piece of outgoing mail confiscated. The mailing contained a drawing of a Swastika with a legend displaying three prominent, stylized upper-case letter Ks (KKK). The mailing also included a letter expressing a desire to merchandise the drawing in a form in which it could be reintroduced into the prison.

The two questions presented are:

(1) Did the Seventh Circuit correctly apply the standard set forth in *Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974) and *Thornburgh v. Abbott*, 490 U.S. 401, 411-13 (1989) to the uncontroverted facts in the record?

(2) Is the confiscation of mail containing gang symbols supported by the legitimate penological interests of prison security and rehabilitation?

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STATEMENT OF THE CASE

The petitioner, Joseph D. Koutnik, is an inmate at the Wisconsin Secure Program Facility (WSPF), Boscobel, Wisconsin, and a member of the Simon City Royals, a "usually white" gang, that opposes the introduction of other races into their territories (R. 13:¶¶ 1, 62-64). In December 2002 he sent a letter to Northern Sun, a company that sells t-shirts, posters, and stickers, in his attempt to merchandise his drawing of a Swastika with a hand-drawn legend featuring three large, stylized capital Ks (R. 13:¶ 24). One of the respondents and prison gang expert Lebbeus Brown (R. 13:¶ 7-10), then a Lieutenant at WSPF, prevented the letter from being sent, and issued a "Notice of Non-Delivery of Mail" (R. 13:¶¶ 26-27). He informed Koutnik (R. 13:¶ 27) that the Swastika drawing violated Wisconsin Administrative Code DOC § 303.20(3), which provides as follows:

> (3) Any inmate who participates in any activity with an inmate gang, as defined in s. DOC 303.02(11) or possesses any gang literature, creed, symbols or symbolisms is guilty of an offense. An inmate's possession of gang literature, creed, symbols or symbolism is an act which shows that the inmate violates the rule. Institution staff may determine on a case by case basis what constitutes an unsanctioned group activity.

Brown averred in an affidavit that the Swastika has become a symbol of Aryan pride and white supremacy, as well as racial hatred (R. 13:¶ 13). Thus it is not allowed in Wisconsin Department of Corrections (DOC) institutions (R. 13:¶ 31). Similarly, Brown reasonably interpreted the

three capital Ks to be a reference to the KKK or Ku Klux Klan, reinforcing the symbolism of the Swastika drawing (R. 13:¶ 37).

White supremacist groups are not sanctioned by or approved to operate in WSPF (R. 13:¶ 36). Brown concluded that Koutnik, by attempting to send the drawing and accompanying letter to Northern Sun, was identifying with and trying to promote the growth of white supremacist groups while merchandising white supremacy material (R. 13:¶ 40).

Koutnik's letter to Northern Sun contained a request that the design be merchandised to prison inmates (R. 13:¶ 24). As a result, Brown concluded that Koutnik was attempting to use his outgoing mail to directly affect the safety of the prison system by his attempt to reintroduce his white supremacy drawing into the prison system, where it might be possessed by and circulated among other inmates (R. 13:¶ 40). Brown also determined that permitting such an activity would encourage inmates holding white supremacist beliefs to engage in racially-motivated disruptive behavior by associating WSPF with the merchandising of white supremacist materials (R. 13:¶¶ 42-43). As a result, Koutnik's outgoing mail was seized on December 30, 2002, and not delivered, because the attempt to merchandise white supremacy materials from inside the prison was incompatible with WSPF's duty to provide a safe and secure environment for all inmates, staff, and visitors. Additionally, the seizure of Koutnik's mail was related to the penological goal of rehabilitation (R. 13:¶ 49). Brown averred that rehabilitation efforts at WSPF include encouraging Koutnik to live crime-free upon release and to develop the ability to solve conflicts without resorting to violence (R. 13: ¶¶ 49-50). Another important rehabilitation goal is to encourage Koutnik to recognize that successful reintegration into society requires

respecting the rights of others (R. 13:¶ 50). According to Brown, merchandising white supremacy materials is incompatible with these rehabilitation goals (R. 13:¶ 51).

Koutnik brought his action under 42 U.S.C. § 1983. He mounted a facial challenge to § DOC 303.20(3), as overbroad and unconstitutionally vague. He also brought an as-applied challenge to the confiscation of his mailing, that this action violated his limited First Amendment free speech rights and rights under the substantive component of the Due Process Clause (R. 2). In its 28 U.S.C. § 1915A order, the district court denied the petitioner leave to proceed on his facial challenge to § DOC 303.20(3) and on his substantive due process claim (R. 3). *Koutnik v. Brown*, 2004 WL 2110746, 2004 U.S. Dist. LEXIS 19069 (W.D. Wis.). The district court subsequently granted summary judgment in favor of the respondents on the remaining free exercise claim (R. 36). *Koutnik v. Brown*, 2005 WL 1484593, 2005 U.S. Dist. LEXIS 12643 (W.D. Wis.). The court of appeals affirmed the judgment of the district court, holding that § DOC 303.20(3) was neither unconstitutionally overbroad, nor unconstitutionally vague. *Koutnik v. Brown*, 456 F.3d 777, 781, *et seq.* (7th Cir. 2006). In addition, the court of appeals expressed approval of the district court's handling of the substantive due process claim and held that the confiscation of the petitioner's mail did not violate the petitioner's limited free exercise rights; because this conduct furthered the important penological interest of rehabilitation. *Id.* at 781-82 n.2, 784, *et seq.*

REASONS WHY THIS COURT SHOULD NOT GRANT THE PETITION

A. The Court of Appeals' Application of *Martinez* Does Not Raise a Compelling Question.

This Court's first landmark decision regarding First Amendment rights in the prison context was *Procunier v. Martinez*, 416 U.S. 396 (1974). The Court set two requirements for prison regulations that limited prisoners' First Amendment rights:

> First, the regulation or practice in question must further an important or substantial government interest unrelated to the suppression of expression. . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.

Id. at 413. Fifteen years later the Court decided *Thornburgh v. Abbott*, 490 U.S. 401 (1989), which replaced the *Martinez* standard with the reasonableness test promulgated in *Turner v. Safley*, 482 U.S. 78 (1987), when applied to in-coming mail, and also clarified the holding of *Martinez*. In regard to in-coming mail, the Court explained the proper interpretation of "necessary or essential" by stating:

> We do not believe that *Martinez* should, or need, be read as subjecting the decisions of prison officials to a strict "least restrictive means" test. As noted, *Martinez* required no more than that a challenged

> regulation be "generally necessary" to a legitimate government interest.

Thornburgh, 490 U.S. at 411.

Following *Thornburgh* there was a split among the circuits on the standard applied to out-going mail cases.[1] Most circuits apply the standard set out in *Martinez*. They are the First, Third, Sixth, Seventh, Ninth, and Tenth. *Stow v. Grimaldi*, 993 F.2d 1002 (1st Cir. 1993); *Nasir v. Morgan*, 350 F.3d 366 (3rd Cir. 2003); *Bell-Bey v. Williams*, 87 F.3d 832 (6th Cir. 1996); *Koutnik v. Brown*, 456 F.3d 777 (7th Cir. 2006); *Witherow v. Paff*, 52 F.3d 264 (9th Cir. 1995); *Treff v. Galetka*, 74 F.3d 191 (10th Cir. 1996). Two circuits apply the *Turner* reasonableness standard. They are the Fifth and Eighth. *Brewer v. Wilkinson*, 3 F.3d 816 (5th Cir. 1993); *Smith v. Delo*, 995 F.2d 827 (8th Cir. 1993).

However, a close reading of the cases applying *Martinez* and those applying *Turner* indicates that the difference between the two standards is largely superficial. In *Martinez* the court required that mail restrictions (1) further an important government interest, such as security, order, or rehabilitation, and (2) be no broader than

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[1] Koutnik attempts to further divide the circuits that apply the *Martinez* standard into circuits that consider *Thornburgh* to have "restated" *Martinez* and circuits that view *Thornburgh* as having "preserved" *Martinez*, Pet. for Cert. at 12-14, but this difference is purely semantic. Several circuits have in fact reiterated the *Thornburgh* Court's statement that *Martinez* did not create a "least-restrictive means test." *See Bell-Bey v. Williams*, 87 F.3d 832 (6th Cir. 1996); *Nasir v. Morgan*, 350 F.3d 366 (3rd Cir. 2003); and *Witherow v. Paff*, 52 F.3d 264 (9th Cir. 1995). However, Koutnik does not identify any post-*Thornburgh* cases in which circuit courts have applied a least-restrictive means test, indicating that the courts applying the "preserved" *Martinez* standard are applying it as modified by *Thornburgh* without an explicit statement that *Martinez* was clarified by *Thornburgh*.

"is necessary or essential" to protect the government interest. *Martinez*, 416 U.S. at 413. In *Turner*, the Court created a four-part test that seeks to determine: (1) whether a prison regulation is legitimate, neutral, and reasonably related to a legitimate government interest, (2) whether the plaintiff has an alternative means of exercising the rights asserted, (3) the impact the accommodation would have on prison operation, and (4) whether the presence of other alternatives undermines the reasonableness of the regulation. *Turner*, 482 U.S. at 89-90.

The two tests are extremely similar in application. The first prong of both tests asks whether there is a relationship between the prison regulation and a legitimate government interest. The latter portion of each test examines the strength of the relationship between the regulation and the government interest, either by asking whether it is "necessary or essential" or by asking if there are alternative means of either exercising the right or achieving the penological goal.

This similarity between *Martinez* and *Turner* has been recognized by two circuits. The Eighth Circuit began applying *Turner* to out-going mail cases only after stating:

> *Martinez* should be understood as striking down the regulation because it was not rationally related to a legitimate and neutral penological objective and because the regulation went further than necessary to serve valid governmental interests. This is not different from the analysis mandated by *Turner*.

Smith, 995 F.2d at 830. Similarly, in *Nasir* the Third Circuit began by applying *Turner* to an in-coming mail question and

then proceeded to apply *Martinez* to an out-going mail question, stating, "[m]uch of the discussion, therefore, that proceeded in the *Turner* analysis is relevant here." *Nasir*, 350 F.3d at 375. In light of the similarity between the two standards, the split between the circuits, to the extent that there is one, is not a compelling reason to grant certiorari.

It should be noted that the court of appeals in the instant matter rejected the respondents' argument that the courts should apply the *Turner* standard to out-going prisoner mail in light of this Court's indication in *Shaw v. Murphy*, 532 U.S. 223, 229 (2001), that there is a unitary standard applicable to prisoners' constitutional claims. *Koutnik*, 456 F.3d at 784 n.4. Of course, the *Turner* standard does not apply to all prisoner claims. *See, e.g., Johnson v. California*, 543 U.S. 499, 509-511 (2005).

B. The Seizure of Koutnik's Mail Was Justified by the Valid Penological Interests of Security and Rehabilitation.

1. The Judicial System Grants Broad Deference to Prison Administrators for the Implementation of Penological Goals.

Koutnik asks the Court to grant a writ of certiorari to determine whether general rehabilitative goals alone can justify the seizure of outgoing mail. However, to the extent that Koutnik ignores the security concerns involved in this case he mischaracterizes the reason for the seizure of his mail. Further, by questioning the determination made by prison officials that restrictions on the use of symbols and language associated with white supremacist gangs are related to the safety or rehabilitation goals of the prison, Koutnik

asks the Court to take on a role it has traditionally been reluctant to fill.

In *Bell v. Wolfish*, 441 U.S. 520, 547 (1979), this Court stated:

> [T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.

Similarly, in *Martinez*, this Court found the judicial system to be "ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Martinez*, 416 U.S. at 405. The judicial system is at a disadvantage in attempting to manage prisons because actions that are "seemingly innocuous" to people who do not work as prison administrators may have potentially significant implications for the operation of the prison. *Thornburgh*, 490 U.S. at 407. As a result, prison administrators are not required to prove harmful consequences, only an objectively rational connection. *Herlein v. Higgins*, 172 F.3d 1089, 1091 (8th Cir. 1999), citing *Turner*, 482 U.S. at 91-92. *See also Thornburgh*, 490 U.S. at 417. As the Court in *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987), emphasized:

> We take this opportunity to reaffirm our refusal, even where claims are made under the First Amendment, to "substitute our judgment on . . . difficult and sensitive matters of institutional administration," *Block*

> *v. Rutherford*, 468 U.S. 576, 588, 82 L. Ed. 2d 438, 104 S. Ct. 3227 (1984), for the determinations of those charged with the formidable task of running a prison.

See also Beard v. Banks, ___ U.S. ___, 126 S. Ct. 2572, 2578, 165 L. Ed. 2d 697 (2006) (plurality opinion) (reiterating that "courts owe 'substantial deference to the professional judgment of prison administrators'" (quoting *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003))).

2. The Marketing of White Supremacist Symbols and Language from Inside the Prison Threatens Prison Security.

Security is central to all objectives of prison administration. *Thornburgh*, 490 U.S. at 415. Seizure of Koutnik's mail bore a logical connection to the provision of prison security by limiting the ability of an admitted gang member to market white supremacist material. There can be no doubt that suppressing any and all white supremacist gang activity is reasonably related to the valid penological goal of prison security. *See Turner*, 482 U.S. at 91-92. *See also Rios v. Lane*, 812 F.2d 1032, 1037 (7th Cir. 1987), *cert. dismissed*, 483 U.S. 1001 (1987). Prison gangs are the primary safety concern in the modern prison. *Wilkinson v. Austin*, 545 U.S. 209, 227 (2005) ("Clandestine, organized, fueled by race-based hostility, and committed to fear and violence as a means of disciplining their own members and their rivals, gangs seek nothing less than to control prison life and to extend their power outside prison walls").

The petitioner is a member of the Simon City Royals, a "usually white" gang, which opposes the introduction of other races into their territories (R. 13:¶¶ 62-64). He was attempting to merchandise, through Northern Sun, his

drawing of a Swastika, a symbol of Aryan pride, white supremacy, and racial hatred, accompanied by a legend that was a coded reference to the Ku Klux Klan (R. 13: ¶¶ 13, 24, 37). White supremacist groups, including the Klan, are not sanctioned or approved by WSPF. Respondent Brown concluded that Koutnik, by attempting to market the drawing and in conjunction with the accompanying letter to Northern Sun, was identifying with and trying to promote the growth of white supremacy groups while merchandising white supremacy materials (R. 13:¶¶ 41-43).

WSPF's security interests were implicated, because allowing Koutnik to engage in the business of merchandising such material out of WSPF would imply that the DOC and WSPF condoned, or even promoted, white supremacist activity within the institution (R. 13:¶¶ 42-43). Brown felt that such a perception by inmates would lead to unrest and racial tension (R. 13:¶ 44). Race hatred and the violence associated with it are particular security concerns within the prison system (R. 13:¶ 45). *See Wilkinson*, 545 U.S. at 227. In addition, Koutnik's letter included a request that Northern Sun merchandise his drawing in a form that would be available to other inmates (R. 13:¶ 46). Thus his letter clearly contemplated that the drawing would be reproduced by Northern Sun in a form which would be reintroduced into the prison and would circulate among inmates within the prison system (R. 13:¶ 46). Respondent Brown concluded that allowing Koutnik to engage in merchandising white supremacy materials from within the prison would be incompatible with WSPF's duty to provide a safe and secure environment for all inmates, staff and visitors (R. 13:¶ 47).

3. In Addition to Safety Concerns, the Seizure of Koutnik's Mail was Necessary to Achieve the Compelling State Interest in Rehabilitation.

In addition to the vital prison safety interest at issue in this case, it is beyond question that rehabilitation is also a substantial government interest. *See Waterman v. Farmer*, 183 F.3d 208, 215 (3rd Cir. 1999) (finding the legitimacy of rehabilitation "beyond dispute"); *Amatel v. Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998) ("The legitimacy of the rehabilitative purpose appears indisputable"); *Mauro v. Arpaio*, 188 F.3d 1054, 1059 (9th Cir. 1999) ("It is beyond question that both jail security and rehabilitation are legitimate penological interests"). Logically, "since most offenders will eventually return to society, [a] paramount objective of the corrections system is the rehabilitation of those committed to its custody." *Pell v. Procunier*, 417 U.S. 817, 823 (1974). Therefore, "[p]rison administrators are responsible for . . . rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody." *Martinez*, 416 U.S. at 404.

Koutnik attempts to find a split among the circuits on the issue of whether a broad definition of rehabilitation can constitute a valid penological interest. Pet. for Cert. at 12-16. This split is purportedly derived from the Third Circuit's decision in *Ramirez v. Pugh*, 379 F.3d 122 (3rd Cir. 2004), which disagreed with an aspect of the reasoning of *Amatel*, 156 F.3d at 199-200, in regard to the breadth of the state's penological interest in rehabilitation. However, the Third Circuit took issue with the *Amatel* decision only to the extent that that decision could be construed to define rehabilitation as "the promotion of 'values,' broadly defined, with no particularized identification of an existing harm towards

which the rehabilitative efforts are addressed." *Ramirez*, 379 F.3d at 128.

Even if this Court were to find a substantial split based on the *Amatel* and *Ramirez* decisions, the instant case is not the case to decide the issue. Koutnik's submission intended to be sent to Northern Sun was not confiscated for the general inculcation of "values." The letter was seized for the narrow reason that it used gang symbols in violation of Wisconsin Administrative Code DOC § 303.20(3), thus implicating the security and rehabilitation goals of WSPF.

Finally, although Koutnik claims that the seizure of his drawing and letter to Northern Sun has impeded his rehabilitation, Pet. for Cert. at 13, the court of appeals rightly came to the opposite conclusion. *Koutnik*, 456 F.3d at 785-86. Koutnik cites this Court's statement in *Martinez* that "the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation." *Martinez*, 416 U.S. at 412. This statement, however, was rooted in two internal policy statements of the Federal Bureau of Prisons. The first stated: "Constructive, wholesome contact with the community is a valuable therapeutic tool in the overall correctional process." *Id.* at 412 n.13 (internal quotation marks and citations omitted). The second statement found that: "Correspondence with members of an inmate's family, close friends, associates and organizations is beneficial to the morale of all confined persons and may form the basis for good adjustment in the institution and the community." *Ibid.* (internal quotation marks and citations omitted). The court of appeals concluded that, "[t]aken in that context, we believe that the Supreme Court's statement in *Martinez* actually supports the defendants' position here." *Koutnik*, 456 F.3d at 785. The court of appeals indicated that Koutnik's correspondence was not an effort to establish

"constructive, wholesome contact" with the outside community that would foster successful reintegration into society. *Ibid.* Instead, it was an effort to appeal to groups that would hinder, rather than foster, respectful human interaction, both inside and outside of prison. *Ibid.* As a result, the attempt to market a Swastika drawing with a KKK legend was obviously incompatible with the identified rehabilitation goals of living free of crime when the petitioner is released from custody, developing the ability to resolve crimes without violence, and "recogniz[ing] that successful reintegration into society requires respecting the rights of others" (R. 13: ¶ 11).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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